Supreme Court, U.S.
FILED

001661 MAY 1 - 2001

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NO.

IN THE
Supreme Court of the United States

ORGANIZATION FOR COMPETITIVE MARKETS, INC.,

Petitioner,

v.

SEABOARD FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Organization for Competitive Markets, Inc. moved to intervene under Federal Rule of Civil Procedure 24(b) to vindicate its common-law right of access to court records that had been sealed pursuant to an agreed protective order in a commercial suit between two agribusiness competitors. Acknowledging a conflict with its sister circuits, the Eighth Circuit held that a nonparty's motion to intervene to gain access to court records does not present a question of law or fact in common with the main action. The Eighth Circuit affirmed the district court's denial of intervention, without considering whether petitioner had a right of access to the relevant court records. The question presented is:

Does an applicant for intervention raise a question of law or fact in common with the main action, as required for intervention under Federal Rule of Civil Procedure 24(b), when the applicant seeks to intervene to pursue its common-law right to obtain access to sealed court records?

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10% or more of the Organization for Competitive Market, Inc.'s stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit summarily affirming the district court's decision is reproduced in the appendix at Pet. App. A1. The opinion denying rehearing en banc is reproduced in the Appendix at Pet. App. A7. The opinion of the district court is reproduced in the Appendix at Pet. App. A8. None of the opinions are reported.

JURISDICTION

The court of appeals entered judgment in this case on February 1, 2001. Petitioner filed a timely petition for rehearing en banc, which the court of appeals denied on March 20, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 24(b) provides in relevant part:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

STATEMENT OF THE CASE

Petitioner Organization for Competitive Markets, Inc. ("OCM") seeks a writ of certiorari to challenge the Eighth Circuit's ruling that a nonparty seeking access to court records filed under seal pursuant to court order may be denied

intervention under Federal Rule of Civil Procedure 24(b), and thus effectively denied inquiry into the merits of the access claim, on the ground that the nonparty has not raised a question of law or fact in common with the main action. Because the ruling is at odds both with the decisions of eight other courts of appeals on precisely the same issue and with the decision of this Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), this Court should grant review.

In this case, OCM, a nonprofit organization, seeks to intervene in a civil suit to obtain access to court records filed under seal pursuant to a protective order. Specifically, OCM seeks access to summary judgment exhibits and other records filed with the district court in a suit between Consolidated Nutrition Marketing Corporation ("Consolidated") and Seaboard Farms, Inc. ("Seaboard"). That suit, which has now been settled, involved allegations that Seaboard unlawfully engaged in unfair and unjustly discriminatory trade practices and gave unreasonable preference to particular localities in violation of the Packers and Stockyards Act, 7 U.S.C. §§ 181-231. The district court had jurisdiction over the case pursuant to 28 U.S.C. §§ 1331 and 1332.

OCM was established in 1998 to promote fair and competitive markets for agricultural products and to protect those markets from abuse of power. As a result, OCM has a particular interest in investigating alleged violations of the Packers and Stockyards Act. To further its goals, OCM regularly monitors litigation between agribusinesses such as Seaboard and Consolidated concerning violations of that Act. OCM distributes reports on the issues raised in such litigation and provides public access to trial transcripts and other records from these actions. *See* <www.competitivemarkets.com>.

OCM was unable to obtain access to certain records filed with the district court in the litigation between Seaboard and Consolidated because, at the outset of discovery, the two companies stipulated to a protective order in which they agreed that documents and information produced during discovery and trial that either party believed to contain "trade secrets" or information "sensitive to the parties' business and/or affairs" would be deemed "confidential" and filed under seal. *See* Protective Order ¶ 1 (docket entry 25). The protective order gave the parties complete discretion to designate documents as "confidential" without review or approval by a court. *Id.* ¶¶ 1, 2, 4. The protective order was signed by the magistrate judge, despite the parties' failure to provide any evidence to support the sealing of records, and despite the magistrate judge's failure to make any findings that there was "good cause" for the protective order, as required by Federal Rule of Civil Procedure 26(c).

Consolidated and Seaboard filed numerous documents with the district court under seal. For example, Consolidated filed papers in support of its motion for partial summary judgment under seal, and Seaboard filed an opposition to that motion that included records filed under seal. *See* Docket Entries 188, 244, 245. These court filings were the basis for the district court's decision on February 7, 2000, denying Consolidated's motion for partial summary judgment and granting in part and denying in part Seaboard's motion for partial summary judgment. *Consolidated Nutrition Marketing Corp. v. Seaboard Farms*, 2000 U.S. Dist. LEXIS 1173 (D. Neb. Feb. 7, 2000). Because the court records to which OCM seeks access were the basis for the district court's rulings on substantive matters in the case, they should not remain under seal absent "the most compelling reasons." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); *see also Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988).

The trial between Seaboard and Consolidated commenced on March 7, 2000 and ended eight days later, when the parties agreed to a settlement. Although the trial had not been closed to the public, Seaboard requested that the trial transcript be sealed. In May 2000, OCM sought to review the trial transcript but was informed by court personnel that the entire transcript was sealed pending resolution of Seaboard's request to designate portions of the transcript as confidential. *See* OCM's Brief in Reply in Support of Motion to Intervene at 4 (docket entry 388). On June 2, 2000, OCM filed a motion to intervene "for the limited purpose of opposing [Seaboard's] request that certain portions of the trial transcript be designated confidential and filed under seal, and seeking public access to documents, evidence, information, and other things currently deemed confidential in this case." *Id.* at 1. With its motion to intervene, OCM also filed an opposition to Seaboard's motion to seal the trial transcript and a motion seeking to modify the protective order to unseal records filed with the court. Only Seaboard filed an opposition to OCM's motions.

The district court denied OCM's motion to intervene, in part because it concluded that OCM's challenge to the protective order did not raise questions of fact or law in common with the main action. *Consolidated Nutrition Marketing Corp. v. Seaboard Farms,* 2000 U.S. Dist. LEXIS 12526 at *12-*17 (D. Neb. Aug. 28, 2000) (Pet. App. A18-A19). The district court recognized that "[n]ot all courts require a tight nexus of fact and law when an individual seeks permissive intervention only to modify a protective order." *Id.* at *16 (Pet. App. A18). However, the court refused to adopt a "relaxed standard of commonality." *Id.* at *17 (Pet. App. A18). As a result, the district court did not reach the merits of OCM's motion to modify the protective order. The district court did not explain how a nonparty could ever challenge the parties'

agreement to seal court records if a nonparty cannot intervene to protect this interest.[1]

OCM appealed the district court's denial of OCM's motion to intervene and motion seeking to vacate or modify the protective order. Only Seaboard appeared to defend the appeal.

On February 1, 2001, the Eighth Circuit summarily affirmed the district court's denial of OCM's motion to intervene, in a brief unpublished opinion. The Court concluded that Rule 24(b)'s requirement that the putative intervenor raise an issue of law or fact in common with the main action barred OCM's motion because "the only thing the motion for permissive intervention and the underlying litigation have in common are the materials covered by the protective order." Pet. App. A5. In so holding, the panel expressly noted and rejected the conclusion of its sister circuits that nonparties may intervene solely for the purpose of seeking access to court records. *Id.* Like the district court, the panel did not address the obvious consequences of its ruling: that denial of intervenor status effectively prohibits nonparties from vindicating their common-law right of access to court records. *See, e.g., Nixon*, 435 U.S. at 597. OCM filed a motion for rehearing en banc that was denied on March 20, 2001.

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[1] Although the district court did not address the merits of OCM's motion to modify the protective order to unseal records filed under seal, it did reject Seaboard's request that the trial transcript be sealed because it was not persuaded that disclosure would cause Seaboard competitive harm. *Id.* at *19 (Pet. App. A19-A21).

REASONS FOR GRANTING THE WRIT

The panel's decision that nonparties may not intervene to seek access to court records conflicts with the decisions of the eight circuit courts that have addressed this issue, all of which have concluded that intervention is the appropriate method for a nonparty to challenge protective orders. Moreover, because the panel's decision effectively bars nonparties from obtaining access to court records under seal, it conflicts with decisions of this Court recognizing the public's common-law right of access to such records.

A. THE EIGHTH CIRCUIT'S DECISION CREATES A CONFLICT IN THE CIRCUITS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

Aside from the Eighth Circuit, "every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." *E.E.O.C. v. National Children's Center, Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (gathering cases). These circuit courts grant nonparties intervenor status even when the nonparties seek to intervene solely to obtain access to court records, and thus raise no issue of fact or law relating to the merits of the litigation.[2] Indeed,

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[2] *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988) (permitting intervention of public health organizations interested solely in obtaining access to documents concerning safety of cigarettes); *United States v. Amodeo*, 71 F.3d 1044, 1047 (2d Cir. 1995) (permitting intervention of newspaper interested solely in obtaining access to court officer's report); *In re "Agent Orange" Product*

(continued...)

the individuals seeking access to court records are frequently members of the media, who have no personal stake in the underlying litigation but nonetheless are permitted to intervene to argue in favor of public access to records. *See supra* note 2.

The district court held that nonparties can never intervene for the sole purpose of seeking access to sealed court records, on the theory that the interest of nonparties in obtaining access to such records does not raise a question of law or fact in common with the main action, as is required to intervene under Rule 24(b). *See* Pet. App. A18. The Eighth

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[2](...continued)
Liability Litig., 821 F.2d 139, 141 (2d Cir. 1987) (permitting intervention of Vietnam Veterans of America interested solely in obtaining access to discovery materials); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-778 (3d Cir. 1994) (permitting intervention of newspaper interested solely in obtaining access to court records); *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (permitting intervention of newspaper interested solely in obtaining access to court records); *Davis v. East Baton Rouge Parish School Board*, 78 F.3d 920, 923 (5th Cir. 1996) (permitting intervention of news organizations interested solely in seeking access to information about litigation); *In re the Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 471 (6th Cir. 1983) (permitting intervention of newspapers interested solely in obtaining access to court records); *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (permitting intervention of newspaper interested solely in challenging order sealing settlement agreement); *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1327 (D.C. Cir. 1985) (permitting intervention of newspaper reporters interested solely in unsealing court records).

Circuit agreed and, like the district court, rejected the conclusion that the "scope or need for the confidentiality order itself presents a common question that links the movant's challenge with the main action." Pet. App. A5 (quoting and citing cases from other circuits with which it disagreed). According to the Eighth Circuit, nonparties without a stake in the underlying litigation—such as newspapers, journalists, and public interest organizations like OCM—are never permitted to intervene to challenge protective orders barring public access to judicial documents and proceedings.

As the panel acknowledged, its decision conflicts with decisions of those of its sister circuits who "'have gone so far as to hold that the issue of the scope or need for the confidentiality order itself presents a common question that links the movant's challenge with the main action.'" Pet. App. A5 (quoting *E.E.O.C.*, 146 F.3d at 1047). For example, in *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000), the Seventh Circuit permitted a newspaper to intervene in an employment dispute solely for the purpose of contesting the district court's decision to seal the settlement agreement negotiated by the parties. That court noted that "although there is ample justification for the common fact or law requirement when the proposed intervenors seek to become a party to the action, 'there is no reason to require such a strong nexus of law or fact when a party seeks to intervene only for the purpose of modifying a protective order.'" *Id.* (quoting *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992)). Likewise, in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-778 (3d Cir. 1994), the Third Circuit held that a newspaper was permitted to intervene to challenge a confidentiality order, even though it only wished to report on the litigation, not become a party to it.

Indeed, OCM is aware of only one other decision denying a nonparty intervention to seek access to court records, and that decision is also from the Eighth Circuit. In *Webster Groves School District v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990), the Eighth Circuit affirmed without discussion the district court's denial of Pulitzer's motion to intervene to seek access to court records and proceedings. The panel in the case at bar did not cite *Webster Groves* as the basis for its summary affirmance. Nonetheless, like any other Eighth Circuit panel, it is bound by *Webster Groves* to affirm all future denials of intervention motions when the sole purpose for intervening is to gain access to court records. In sum, the conflict between Eighth Circuit law and the law of other circuits warrants this Court's review. [3]

B. THE EIGHTH CIRCUIT'S DECISION IS AT ODDS WITH THIS COURT'S DECISIONS RECOGNIZING A COMMON-LAW RIGHT OF ACCESS TO COURT RECORDS.

The Eighth Circuit's decisions denying intervenor status to nonparties effectively bars nonparties from seeking access to

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[3] The panel's summary affirmance is unpublished, rendering the decision of questionable precedential value. *See* 8th Cir. R. 28A(i). However, the panel's express recognition that it was deviating from the decisions of its sister circuits, the Eighth Circuit's decision to deny rehearing en banc, together with the Eighth Circuit's previous denial of intervention in *Webster Groves* all indicate that the Eighth Circuit will routinely affirm district court decisions denying intervention in access to court records cases on the ground that the applicant for intervention has not raised a question of fact or law in common with the main action.

judicial records. Thus, the Eighth Circuit's rulings are incompatible with the decisions of this Court recognizing a common-law right of access to such records.

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), this Court declared that "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597 (footnotes omitted). The right of access to court records, like the right to observe trials, serves to enhance the basic fairness of the proceedings and safeguards the integrity of the factfinding process. *See Press-Enterprise v. Superior Court*, 464 U.S. 501, 508 (1984); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 604-06 (1982). That right has never been limited by this Court to only those few individuals who have a personal stake in the merits of the underlying litigation. Indeed, had this Court intended to so limit the right of access, it would have denied access to the members of the media in the above-cited cases.[4]

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[4] Moreover, the public also may have a First Amendment right to obtain access to court records in civil cases. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), the Supreme Court held that there is a First Amendment right of public access to attend criminal proceedings that may only be overcome by a compelling governmental interest. *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-10 (1986). This Court has not yet addressed whether the First Amendment right of access applies to civil proceedings. However, in determining whether the First Amendment right of access extends to a particular type of proceeding, this Court considers "whether the place and process have historically been

(continued...)

For the common-law right of access to court records to have any meaning, members of the public must be permitted to intervene so that they can vindicate that right. In a recent decision, the Seventh Circuit has recognized the necessary link between the right to intervene and the right of access to court records:

> In order to preserve the right of access, those who seek access to [sealed] material have a right to be heard in a manner that gives full protection to the asserted right. Representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion from the proceedings or access to the documents. Thus, we have recognized intervention as the logical and appropriate vehicle by which the public and press may challenge a closure order. This method not only

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[4](...continued)
open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co.*, 478 U.S. at 8. Extrapolating from those criminal cases, numerous courts have concluded that a First Amendment right of access also applies to certain judicial records and documents in civil cases, because "'historically both civil and criminal trials have been presumptively open.'" *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 & n.4 (4th Cir. 1988); *see also Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1308-10 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1177-80 (6th Cir. 1983); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

> guarantees the public's right to be heard, it also ensures that the issue [of closure will] be examined in a procedural context that affords the court an opportunity for due deliberation.

Jessup, 227 F.3d at 997.

Courts not only recognize intervention as an appropriate vehicle through which nonparties can seek to obtain access to court records, they consider it the exclusive method by which nonparties can do so. *See, e.g., Jessup*, 227 F.3d at 997 ("It is apparent . . . that intervention is the procedurally appropriate course for third-party challenges to protective orders.") (quotation and citation omitted); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988) ("[W]e are not willing to create a special category of non-Rule 24 intervention for third parties who wish to challenge protective orders through informal motion."); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979) (holding that intervention is "the procedurally correct course" for nonparty challenges to protective orders). Thus, the panel's decision barring nonparties from intervening effectively prevents nonparties from seeking to unseal court records. Review is warranted here because, absent action by this Court, nonparties in the Eighth Circuit will be denied any means by which to vindicate their common-law right of access to court records.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court should summarily reverse the decision below or set the case for plenary review.

May 1, 2001

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United States Court of Appeals
For The Eighth Circuit

No. 00-3432

Consolidated Nutrition Marketing Corporation,
Plaintiff,

Organization for Competitive Markets, Inc.,
Movant-Appellant,

v.

Seaboard Farms, Inc.,
Defendant-Appellee.

Seaboard Farms, Inc.,
Plaintiff-Appellee,

v.

Consolidated Nutrition, L.C.,
Defendant.

Organization for Competitive Markets, Inc.,
Movant-Appellant.

Appeal from the United States District Court
for the District of Nebraska

Filed: February 1, 2001

Before McMILLIAN, LOKEN and HANSEN, Circuit Judges.

PER CURIAM.

The Organization for Competitive Markets, Inc. (OCM), appeals from an order entered in the District Court[1] for the District of Nebraska denying its motion for permissive intervention for the limited purpose of obtaining access to materials covered by a protective order and the related motion to vacate or modify the protective order. *Consolidated Nutrition Marketing Co. v. Seaboard Farms Inc.*, No. 8:98CV407 (D. Neb. Aug. 28, 2000) (order). For the reasons discussed below, we summarily affirm the order of the district court.

The underlying litigation between Consolidated Nutrition Marketing Corp. (Consolidated) and Seaboard Farms, Inc. (Seaboard), involved breach of contract and tort claims. The parties stipulated to a protective order to protect from disclosure certain materials, including but not limited to items produced during discovery, evidence, and pleadings, which any party deemed to be confidential, contain trade secrets or include information sensitive to the parties' business. Pretrial hearings and the trial itself were not closed to the public. The trial began on March 7, 2000, and ended on March 16, 2000, just as Consolidated closed its case-in-chief, because the parties had settled the case. On April 3, 2000, the district court granted the parties' stipulated motion to dismiss with prejudice.

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[1]The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.

On June 2, 2000, OCM filed its motion for permissive intervention for the limited purposes of opposing Seaboard's motion to seal certain portions of the trial transcript and to obtain access to materials covered by the protective order in order "to make available to 'farmers, ranchers, policy makers and the general public' information affecting the marketing of livestock and to 'refine public knowledge about the meatpacking industry.'" *Id.* at 6 (citing OCM's brief supporting the motion to intervene at 2). OCM describes itself as "a non-profit organization established in 1998 that seeks to reestablish fair and competitive markets for agricultural products and to protect those markets from any abuse of power." *Id.* at 5 (citing OCM's brief supporting the motion to intervene at 2).

The district court denied the motion for permissive intervention because OCM did not have standing, *id.* at 7, and there was no claim or defense that raised a common question of law or fact. *Id.* at 9. The district court noted that OCM's motion for permissive intervention raised public interest and First Amendment issues, while the underlying litigation was a lawsuit between two businesses over breach of contract and tort claims. *Id.* The district court also found that the motion for permissive intervention was timely filed. *Id.* at 8. The district court then denied as moot OCM's motion to vacate or modify the protective order as moot. The district court also denied as moot OCM's motion to prohibit the withdrawal or destruction of trial exhibits, denied Seaboard's motion to seal as confidential certain portions of the trial transcript and modified the protective order to exclude testimony given in open court during the trial.

OCM filed a timely notice of appeal from the district court order denying its motion for permissive intervention and to vacate or modify the protective order. Seaboard filed a

motion for summary disposition of the appeal in its favor; OCM filed a response and Seaboard a reply.

First, this appeal is not moot. OCM did not appeal the district court order denying as moot its motion to prohibit the withdrawal or destruction of trial exhibits. According to the notice of appeal and appeal information form, OCM designated as issues on appeal the district court order denying its motion for permissive intervention and to vacate or modify the protective order. Those parts of the district court order were not made moot by the return of the trial exhibits to the parties after the case was settled, a fact which we would agree would make moot an appeal from that part of the district court's order. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781 (lst Cir. 1988) (noting that trial exhibits returned to parties after case has completely terminated are no longer judicial records within supervisory power of district court and may be destroyed), *cert. denied*, 488 U.S. 1030 (1989).

We review the district court order denying the motion for permissive intervention for abuse of discretion. Fed. R. Civ. P. 24(b) (district courts "may" allow intervention if requirements of rule are met); *see e.g., EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, 1048,333 U.S. App. D.C. 101, 107 (1998); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66,73 (2d Cir. 1994) (noting reversal of denial of motion for permissive intervention is "very rare"). We cannot say that the district court abused its discretion in denying the motion for permissive intervention.[2] We agree with the district court that

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[2]We need not decide whether a third party seeking permissive intervention for the limited purpose of obtaining access to materials covered by a protective order must have

OCM failed to raise a claim or defense that shared a common question of law or fact with the underlying litigation. We decline to adopt the position of those "courts [which] have gone so far as to hold that the issue of the scope or need for the confidentiality order itself presents a common question that links the movant's challenge with the main action." *EEOC v. National Children's Center, Inc.*, 146 F.3d at 1047, 333 U.S. App. D.C. at 106, *citing Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-78 (3d Cir. 1994) (holding commonality requirement is satisfied whenever a third party objects to a confidentiality order). Here, the only thing the motion for permissive intervention and the underlying litigation have in common are the materials covered by the protective order. *Compare id.*, 146 F.3d at 1047-48, 333 U.S. App. D.C. at 106-07 (noting both suits were brought against same defendant based on acts of sexual misconduct allegedly committed by defendant's employees during roughly same period of time); *Beckman Industries Inc. v. International Insurance Co.*, 966 F.2d 470, 474 (9th Cir.) (noting interpretation of insurance policies in

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standing. *See Planned Parenthood of Mid-Mo. & E. Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 577 n.2 (8th Cir. 1998) (listing cases). *But cf. EEOC v. National Children's Ctr., Inc.*, 146 F.3d 1042, 1046-47, 333 U.S. App. D.C. 101, 105-06 (1998) (noting permissive intervention requires independent basis for jurisdiction but that "courts have crafted a narrow exception for the limited purpose of obtaining access to documents protected by a confidentiality order" because "such intervenors do not ask the district court to exercise jurisdiction over an additional claim [or defense] on the merits, but rather to exercise a power that it already has, namely the power to modify a previously entered confidentiality order") (citations omitted).

district court action and state court actions satisfied commonality requirement), *cert. denied*, 506 U.S. 868 (1992).

We hold that the district court did not abuse its discretion in denying OCM's motion for permissive intervention because the motion did not raise a claim or defense that shared a common question of law or fact with the underlying litigation. Accordingly, we summarily affirm the order of the district court.

A true copy.

Attest: Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3432

Organization for Competitive Markets, Inc., et al.,

Appelant,

v.

Seaboard Farms, Inc.,

Appellee.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

March 20, 2001

Order Entered at the Direction of the Court

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Consolidated Nutrition Marketing Corp.,
Plaintiff,

vs.

Seaboard Farms, Inc., and Seaboard Corporation,
Defendant.

Seaboard Farms, Inc.,
Plaintiff,

vs.

Consolidated Nutrition, L.C., et al.,
Defendants.

Case No. 8:98CV407
consolidated with
Case No. 8:99CV175

ORDER

Before me are three motions filed by the Organization for Competitive Markets (OCM): 1) a motion (Filing Nos. 382 and 288)[1] to intervene; 2) a motion (Filing Nos. 390 and 297) to prohibit the withdrawal or destruction of exhibits; and 3) a

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[1]The first filing number shall hereafter refer to case number 98CV407 and the second to case number 99CV175.

motion (Filing Nos. 391 and 296) to vacate or modify the magistrate's earlier protective order (Filing No. 25)[2] OCM supports its motions with briefs and indexes of evidence (Filing Nos. 383 and 392; 289 and 298). Seaboard opposes the motions with briefs and indexes of evidence (Filing Nos. 387 and 393; 293 and 299). Consolidated did not respond to OCM's motions or to Seaboard's briefs.

I also have before me Seaboard's designations of those portions of the trial transcript it believes should be sealed as confidential pursuant to the parties' stipulated protective order (Filing No. 25). A copy of Seaboard's proposed order setting out the designations is attached to this order as Appendix 1. Consolidated made no designations of its own and did not object to Seaboard's designations.

In the protective order at issue here, Consolidated and Seaboard agreed that

> certain documents, information or things which will be produced during discovery or otherwise contain sensitive and private marketing, business or other proprietary information, the disclosure of which to the other party could give that party a competitive, business or other advantage, or which could be otherwise detrimental to the business interests of the producing party.

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[2]Magistrate Judge Thalken entered the protective order in 98CV407 on January 13, 1999. 99CV175 was not filed until May 1999, so no separate protective order was entered in that case.

Filing No. 25 at 1, ¶ 2. They agreed that the scope of the protective order would include

> (i) certain documents, information and things which will be produced during discovery, or produced pursuant to a subpoena *duces tecum* or otherwise, (ii) evidence which will be adduced prior to or at the time of trial and portions of testimony to be taken (whether at deposition, hearing or trial), (iii) pleadings, affidavits, briefs, motions, transcripts and other writings which are or may be filed and (iv) various other matters which include, but are not limited to, information which any party may deem confidential, contain trade secrets or include information sensitive to the parties' business and/or affairs and shall be entitled to protection against disclosure pursuant to this Protective Order.

Id. at 1, ¶ 1. The remainder of the order described how the parties were to designate, utilize, and safeguard information or documents subject to the order which were produced during discovery. Whether marked "Confidential" or "For Counsel's Eyes Only," information or documents were to be used "only for purposes of this litigation and may not be used for any purpose outside the reasonable conduct of this case." *Id.* at 5, 6, ¶¶ 6(a), 7(a).

The order did not specifically discuss how the parties would handle information or documents subject to the order when incorporated into an exhibit or otherwise used during a hearing or at trial apart from the general language referring to "transcribed hearings, transcribed files, deposition testimony or affidavit."

> 4. If a party determines that a document or thing of any description to be furnished, produced, or made a part of any pleadings or papers to be filed, or any briefs, testimony, affidavits and/or evidence to be offered, contains or may contain information which that party believes to be proprietary or confidential pursuant to Paragraph 1 of this Protective Order, the party requesting protection shall designate such document, testimony or affidavit as "Confidential" in the following manner:
>
> . . . .
>
> (d) In the case of transcribed hearings, transcribed files, deposition testimony or affidavit, by advising the other party in writing of the witness whose testimony is to be deemed confidential.

Id. at 3-4, ¶ 4(d).

The parties did not decide whether the protective order would have continuing effects at the termination of the trial other than to agree that the protective order would be binding on "the parties, their attorneys, agents, employees, representatives, successors and assigns," *Id.* at 8, ¶ 11, and that within thirty days "after the final determination of this action, each party to the litigation and its attorneys shall assemble and return to the producing party or parties the originals and all copies of documents produced in discovery designated by the producing party as "Confidential" or "For Counsel's Eyes Only." *Id.*, ¶ 10. The courtroom deputy has returned all trial exhibits to the parties, Filing Nos. 393 and 299, Seaboard's Index of Evidence Opposing Motion to Prohibit Withdrawal or Destruction of Exhibits, Aff. of B. Gassaway at 2, ¶ 2.

Significantly, the parties agreed that the court could modify the protective order "at any time on its own motion." *Id.*, ¶ 9.

Neither party used the protective order as the basis for a motion to close the courtroom during pretrial hearings or the trial itself. The parties tried the case to a jury in open court beginning on March 7, 2000. On March 13, 2000, I held the following colloquy with counsel:

> THE COURT: I've been informed that the lawyers need to talk to me. Who needs to talk first?
>
> MR. McLEAY: I was going to offer an issue to the court having to do with the protective order in this case.
>
> We have a protective order that prescribes any testimony treating to confidential documents and confidential documents themselves would be protected.
>
> We kept pretty close tabs of who has been in the courtroom and know there have been no witnesses, I know there was a reporter briefly to describe the situation, but there has been no access to the confidential documents.
>
> All I wanted to do was at this time, I guess, for the record, to say pursuant to paragraph 4(d) of the protective order that was entered, that with respect to the testimony of Mr. Brock, Mr. Treiber and Mr. Croucher, to the extent that that testimony concerned kill sheets and exception reports, that's what we have declared as confidential in the lawsuit.
>
> And we will advise the court specifically of both the testimony by page and line, if necessary, as well as the specific exhibits that would be at issue in this case,

and we'll do that by correspondence to the court as we go along, at the end of the case, or however the court would like that, we would be happy yo do that. We would like to keep the protection order.

So you have an understanding of the flavor as to why, the kill sheets, for example, contains pricing information.

If our producers know that pricing information, they can use that potentially against us in some way during negotiations.

THE COURT: Mr. Dahlk?

MR. DAHLK: Your Honor, we object to that. I don't know how to comply with something that is in open court and testified to.

I stipulated early in this case to that protective order, thinking that the burden was on them to keep proving the confidentiality of information, and apparently it wasn't, and I was wrong, I don't want to have that situation again.

THE COURT: What situation?

MR. DAHLK: The situation where we have testimony in open court and somehow we are in supposed violation of a protective order that is ridiculously broad.

THE COURT: Well, I don't want to limit the evidence in any way as far as the open court is concerned.

If there is some proprietary interest that Seaboard wants to protect, then at the conclusion of the

> trial you can present those portions of the record that you think are confidential and should be sealed and we'll go from there.
>
> MR. McLEAY: We will do just that, Your Honor.
>
> THE COURT: Is that acceptable to you, Mr. Dahlk?
>
> MR. DAHLK: That great, Your Honor. Thank you.

Filing No. 378E, Transcript, 549:3-551:3.

The trial ended on March 16, 2000, just as Consolidated closed its case-in-chief. On April 3, 2000, I granted (Filing Nos. 380 and 286) the parties' stipulated motion (Filing Nos. 379 and 285) to dismiss with prejudice. On May 3, 2000, I ordered (Filing Nos. 381 and 287) the parties to designate for my review those portions of the trial transcript which they believed should be sealed as confidential. Seaboard submitted its designations by letter and a proposed order on May 22, 2000.

OCM's motion to intervene followed on June 2, 2000. OCM describes itself as "a non-profit organization established in 1998 with a mission to reestablish fair and competitive markets for agricultural products; and to protect those markets from any abuse of power." OCM's Brief Supporting Motion to Intervene at 2. OCM seeks to intervene "for the limited purposes of opposing [Seaboard's] request that certain portions of the trial transcript be designated confidential and filed under seal, and seeking public access to documents, evidence, information, and other things currently deemed confidential in

this case." Filing Nos. 382 and 288, OCM's Motion to Intervene, at 1. By OCM's count, Seaboard's designations touched 433 pages of the approximately 1100 pages of transcript and an unknown number of trial exhibits discussed in those pages. OCM's Brief in Support of Motion to Vacate or Modify Protective Order at 3. OCM states that its motivation for seeking access to the trial transcript in this case is to make available to "farmers, ranchers, policy makers and the general public" information affecting the marketing of livestock and to "refine public knowledge about the meatpacking industry." OCM's Brief Supporting Motion to Intervene at 2.

I have reviewed the record, the trial transcript, the parties' briefs and indexes of evidence, and the applicable law, and I conclude that OCM's motions should be denied.

Motion to Intervene

Any person may timely apply for permission to intervene in an action when the "applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). A trial court will deny an application to intervene if "the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* Rule 24 is to be "liberally construed, and doubts should be resolved in favor of allowing intervention." *Arkansas Elec. Energy v. Middle South Energy, Inc.*, 772 F.2d 401, 403 (8th Cir. 1985) (citations omitted).

OCM does not seek to litigate any of the underlying claims in this case, but only to challenge the breadth of the protective order under which Seaboard asks me to seal portions of the trial transcript. Therefore the primary issues in this motion are whether OCM has Article III standing to intervene

permissively, whether the motion is timely, and whether OCM can show a commonality of law or fact between the underlying case and its application.

Standing. While "Article III standing is a prerequisite for intervention in a federal lawsuit," *Curry v. Regents of the Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999) (*quoting Standard Htg. & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 570 (8th Cir. 1998)), OCM argues that in the Eighth Circuit an intervenor must meet the standing requirement only if seeking to intervene as a matter of right under Rule 24(a) and only if it intends to litigate the merits of the case. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1299 (8th Cir. 1996).

It is not entirely clear whether the Eighth Circuit also requires Article III standing for permissive intervention under Rule 24(b) when the intervenor seeks only to challenge a protective order issued in the underlying action. Some circuits have ruled that a motion for permissive intervention under Rule 24(b) is the proper method for a nonparty to challenge a protective order. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988). In those jurisdictions, strict standing is not required. *See, e.g., Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). *See also Planned Parenthood of Mid-Missouri and E. Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 577 n.2 (8th Cir. 1998) (listing cases from circuits that do and do not requiring standing for intervention). While OCM does not seek substantive relief from either Seaboard or Consolidated, instead asking the court only to modify the protective order, OCM nevertheless fails to provide any Eighth Circuit authority to soften the circuit's apparently absolute rule with regard to standing to intervene under Rule 24.

In any event, OCM cannot meet the traditional standing requirements. OCM cannot show an "imminent and direct" injury in fact, *Mausolf v. Babbitt*, 85 F.3d at 1301; 2) a causal connection between the injury and the conduct complained of, *Planned Parenthood of Mid-Missouri and E. Kansas, Inc. v. Ehlmann*, 137 F.3d at 577 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)); and 3) redressability, *id.* I find, therefore, that OCM lacks Article III standing to intervene.

Timeliness. The trial court has the discretion to determine whether a motion to intervene under Rule 24 is timely. *Arkansas Elec. Energy v. Middle South Energy, Inc.*, 772 F.2d at 403 (*citing NAACP v. New York*, 413 U.S. 345, 365-66, 37 L. Ed. 2d 648, 93 S. Ct. 2591 (1973)). The decision is based on all the circumstances, but the court should pay "particular attention" to the stage of the proceedings at which the movant seeks to intervene, the prejudice the parties might suffer because of delay, and the reason for the delay. *Id.* (*quoting Nevilles v. Equal Employment Opportunity Comm'n*, 511 F.2d 303, 305 (8th Cir. 1975)).

The fact that this case has settled does not make OCM's motion untimely. "Intervention has been allowed even after judgment has been entered." Id. (citing *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976)). OCM could not have known that Seaboard would seek to use the protective order to seal substantial portions of the trial transcript until Seaboard actually made its designations and requested an order to seal. OCM filed its motion within two weeks of the court's receipt of Seaboard's designations, and OCM's object in filing the motion will be met when a ruling on Seaboard's pending designations is issued. The parties therefore will not suffer any prejudice by my

consideration of OCM's motion to intervene in conjunction with Seaboard's designations.

Commonality of Law or Fact. Not all courts require a tight nexus of fact and law when an individual seeks permissive intervention only to modify a protective order. For example, insureds suing their insurer in state court over the scope of the insurer's policies were allowed to intervene in an already settled and dismissed federal action between another insured and the same insurer. To allow the insureds access to six depositions transcripts, the federal court modified a protective order that had made all discovery material confidential. The issue of the interpretation of the insurer's policies "supplied a sufficiently strong nexus between the district court action and the state actions to satisfy the commonality requirement." *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d at 474. The court did not require the intervenors' claim to involve the same clause of the policy or the same legal theory because the intervenors were not becoming parties to the underlying litigation.

OCM suggests that such a relaxed standard of commonality should apply here. It contends that the common questions of law or fact which its intervention action shares with the underlying action between Seaboard and Consolidated are 1) whether the trial transcript can be sealed in accordance with the common law and First Amendment rights of access to judicial records, and 2) whether the parties made a showing of good cause sufficient to allow entry of a protective order under Rule 26(c). OCM's Brief in Support of Motion to Intervene at 4.

I find that the underlying action and OCM's motion to intervene share no common questions of law or fact. The public

interest/First Amendment issues OCM puts forward to justify its intervention were never raised or even considered in the underlying business litigation for breach of contract and tort claims except implicitly and in a negative way: Consolidated and Seaboard stipulated that certain documents and information disclosed during discovery should be kept confidential to shield sensitive business records and secrets from the scrutiny of competitors and the general public. The situation here thus differs from that in *Beckman Industries* because there the two actions shared a substantive issue: how insurance policies should be interpreted.

Accordingly, because OCM lacks Article III standing and cannot establish a commonality of law or fact, OCM's motion to intervene is denied.

Motion to Vacate or Modify the Protective Order

OCM also requests that I modify or vacate the protective order (Filing No. 25). Since I have ruled that OCM lacks standing to intervene, I will deny its motion as moot.

Motion to Prohibit Withdrawal or Destruction of Exhibits

Likewise, OCM's lack of standing requires that I deny as moot its motion to prohibit the withdrawal or destruction of exhibits.

Seaboard's Designations

Seaboard seeks to seal a large portion of the trial transcript because testimony or exhibits allegedly dealt with confidential business information or documents produced pursuant to a broad pretrial protective order.

I have reviewed those portions of the trial transcript which Seaboard seeks to seal. Most of the designated testimony and exhibits concerned Seaboard's contract with Consolidated, described Seaboard's personnel and operations at its Guymon, Oklahoma hog processing facility -- admittedly not always in flattering terms -- or examined the raw data on kill sheets, exception reports, and other documents generated in Seaboard's processing of Consolidated's hogs. The testimony and exhibits focused on the commercial relationships among Seaboard, Consolidated, and the hog producers who supplied Consolidated. The testimony and exhibits simply did not reveal trade secrets or other information the disclosure of which could give another entity a competitive business or other advantage over Seaboard.

Despite the seemingly encompassing language of the parties' stipulated protective order, the order did not specifically provide how materials designated as confidential would be introduced at trial or in exhibits. *Cf.* Imageware, Inc. v. U.S. West Communications, 2000 WL 1015865 at *2 (8th Cir. 2000) (parties' protective order included a paragraph detailing treatment of confidential information used at trial). As a result, supposedly confidential materials were introduced and admitted into evidence in open court without any precautions being taken to protect their confidential nature. Any interest in their confidentiality as trade secrets was therefore diminished, if not eliminated.

All the testimony in this case took place in open court without objection from Seaboard. As the colloquy quoted above indicates, counsel for Seaboard raised the possibility that some testimony and exhibits might be covered by the protective order only on the fifth day of the trial. Granting protection to

materials only after they have become part of an open trial record would contravene the integrity of the judicial process.

Since this case settled, several parties in addition to OCM have sought access to this transcript for a variety of reasons. Some of these requests are based on actual litigation against Seaboard, such as the most recent request from the Nebraska Attorney General in connection with a state action filed against Seaboard in Antelope County District Court in Nebraska. *See* Attachment B. Other requests have been based on similar suits against other processors or on potential litigation against Seaboard itself. The public thus has a heightened interest in the subject matter of this litigation which is sufficient to override Seaboard's claimed interest in the secrecy of the trial transcript.

I therefore will not seal those portions of the transcript which Seaboard has designated as confidential. Pursuant to paragraph nine of the protective order, I modify the protective order but only to the extent that the testimony given in open court during the trial of this case is removed from its coverage. The remainder of the protective order shall continue in full force and effect.

IT IS THEREFORE ORDERED that

1. The motion (Filing Nos. 382 and 288) filed by the Organization for Competitive Markets to intervene is denied.

2. The motion (Filing Nos. 390 and 297) filed by the Organization for Competitive Markets to prohibit the withdrawal or destruction of exhibits is denied as moot.

3. The motion (Filing Nos. 391 and 296) filed by the Organization for Competitive Markets to vacate or modify the magistrate's earlier protective order (Filing No. 25) is denied as moot.

4. The request by Seaboard to seal as confidential those portions of the trial transcript identified in its proposed order, Attachment A, is denied.

5. On the court's own motion and pursuant to paragraph nine of Filing No. 25, the parties' protective order is modified but only to the extent that testimony given in open court during the trial of this case is excluded from its coverage. The remainder of the protective order shall continue in full force and effect.

DATED this 28 day of August, 2000.

BY THE COURT:

Joseph F. Bataillon
United States District Judge